

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY	)	MDL No. 1456
AVERAGE WHOLESALE PRICE	)	Civil Action No.
LITIGATION	)	01-CV-12257-PBS
THIS DOCUMENT RELATIONS TO ALL	)	Judge Patti B. Saris
ACTIONS	)	

**DEFENDANTS' REQUEST FOR WRITTEN ORDER ON  
PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER  
REGARDING SUBPOENAS TO PUTATIVE CLASS MEMBERS**

On December 3, 2003, Plaintiffs filed their Motion for a Protective Order Regarding Subpoenas to Putative Class Members [Docket No. 632] and supporting papers. Defendants opposed that motion on January 9, 2004 [Docket No. 687], and the Court denied the Motion in open court at the status conference on March 8, 2004.<sup>1</sup> See Transcript of Proceedings [Docket No. 740] at pages 48-50, copies of which are attached hereto as Exhibit A.

Numerous third-parties have been awaiting the Court's resolution of the Motion before beginning their document productions. Given the pace of discovery for the case in general and for "fast track" defendants particularly, it is imperative that those third-parties begin their document productions immediately. Defendants can best accomplish this objective by sending those third-parties an order issued by this Court. Attached as Exhibit B is a proposed form of order.

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<sup>1</sup> Defendants represented in open court and confirm that they do not plan to seek discovery of elderly or infirm individuals.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court enter the proposed order attached hereto as Exhibit B denying Plaintiffs' Motion for a Protective Order Regarding Subpoenas to Putative Class Members.

Respectfully Submitted,  
ON BEHALF OF DEFENDANTS

March 31, 2004

By: /s/ Lucy Fowler  
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Attorneys for AstraZeneca Pharmaceuticals LP

**CERTIFICATE OF SERVICE**

I certify that on March 31, 2004, a true and correct copy of the foregoing Motion for Entry of Case Management Order No. 10 was served on all counsel of record by electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to Verilaw Technologies for posting and notification to all parties.

/s/ Lucy Fowler  
Lucy Fowler

**CERTIFICATION PURSUANT TO LOCAL RULE 7.1**

Pursuant to Local Rule 7.1(A)(2), the undersigned certifies that counsel for plaintiffs assents to this motion.

/s/ Lucy Fowler  
Lucy Fowler

## **EXHIBIT A**

1                   UNITED STATES DISTRICT COURT  
2                   DISTRICT OF MASSACHUSETTS  
3                   MDL NO. 1456  
4                   CA NO. 01-12257-PBS

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IN RE:  
AVERAGE WHOLESALE PRICE  
PHARMACEUTICAL LITIGATION

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10          BEFORE: The Honorable Patti B. Saris

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12                   STATUS CONFERENCE

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15          John Joseph Moakley United States Courthouse  
16                   Courtroom No. 13  
17                   One Courthouse Way  
18                   Boston, MA 02210  
19                   Monday, March 8, 2004  
20                   3:07 P.M.

21

22                   Cheryl Dahlstrom  
23                   Official Court Reporter  
24                   United States District Court  
25                   595 Main Street, Room 514  
                 Worcester, MA 01608-2076  
                 Mechanical Steno - Transcript by Computer

1                   Otherwise, whatever schedule you set, we're going to  
2                   be where we are now. We just really haven't gotten very far,  
3                   I hate to report to the Court, because of a time lapse. It  
4                   works both ways. They're not happy with our responsiveness.  
5                   The rule applies to us as well. I have a few other things  
6                   like this.

7                   THE COURT: I'm glad you reminded me of that. I do  
8                   think -- one of the concerns I've had is on this issue of  
9                   ERISA preemption, not really knowing what's out there, what  
10                  the plans are, how much the plans will affect damages. What  
11                  are the different kinds of plans? Are they hinged on AWP?  
12                  Aren't they?

13                  Normally, I'm not sympathetic to class discovery. In  
14                  this case it may be critical to understanding not just  
15                  preemption issues but also what's typical. And so I do think  
16                  you need to be responsive to producing plans at the very least  
17                  or a few -- I don't even know if there are different kinds of  
18                  ERISA plans even among the plaintiffs.

19                  MR. BERMAN: All our plans are plans to -- almost all  
20                  of them have been deposed and are producing documents already.

21                  THE COURT: All right. If there are a few -- I don't  
22                  know. I assume you're not going to take a deposition of every  
23                  ERISA plan in America.

24                  MR. WISE: No. I can answer that question no.

25                  THE COURT: I'm just simply saying it may be helpful

1 to find out if these plans are typical of other plans. That's  
2 different from -- I'm not authorizing discovery of the people  
3 who have cancer who are getting the drugs. I think that's a  
4 different situation, and I don't believe that defendants are  
5 looking for that. But I think the different -- while it's  
6 rare, I think this wouldn't be a bad case for it.

7 MR. BERMAN: We agree that this is a case where there  
8 has to be some discovery, a fair amount of discovery, before  
9 the class motion is ripe, both sides.

10 THE COURT: Right. All I'm saying is you had a  
11 motion to preclude class discovery. While I certainly will  
12 grant that with respect to anybody who's sick and receiving  
13 drugs directly as part of a Medicare Part B, I think the plans  
14 themselves are able to protect themselves. And they're  
15 usually not confidential, right? Aren't they usually  
16 distributed to their members? There's nothing that I can  
17 imagine that would be a problem with that.

18 MR. WISE: It's not in our interest to be burdensome  
19 to that community. What we want to do is just develop enough  
20 information so we can present a sample of what --

21 THE COURT: I think that's appropriate because I  
22 remember looking at the case law on it. To some extent I was  
23 not sure what the plans would provide. I think no one here  
24 really probably was at that time other than the named  
25 plaintiffs. What's out there?

1                   MR. WISE: And whether anything is typical of  
2 anything. That's exactly going to be the issue.

3                   THE COURT: There was a motion to intervene. I don't  
4 see why I wouldn't allow that for the --

5                   MR. WISE: Together Rx.

6                   MR. KOCIUBES: It will change the scope again. As  
7 your Honor noted -- well, there are two things. We've already  
8 addressed -- unless your Honor wants me to, I won't, which is  
9 the futility. But the first issue is we had understood from  
10 your Honor that you didn't want the scope of the case to  
11 expand again. And what at least --

12                  THE COURT: They asserted on behalf of both classes,  
13 and then you brought up standing. So no big surprise that  
14 they found somebody.

15                  MR. KOCIUBES: For sure. But at the same time what  
16 you're doing now is you're expanding the scope of that.  
17 There's no question about that. What this really is is a  
18 substantive amendment to the complaint again.

19                  THE COURT: Not really. Did you change any of the  
20 allegations in the complaint?

21                  MR. BERMAN: The class is exactly the same. There's  
22 just a different plaintiff for the standing issues.

23                  THE COURT: I allow the motion to intervene. I allow  
24 your motion for discovery into the different kinds of ERISA  
25 plans for typicality.

**Exhibit B**

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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**[PROPOSED] ORDER DENYING PLAINTIFFS'  
MOTION FOR A PROTECTIVE ORDER REGARDING  
SUBPOENAS TO PUTATIVE CLASS MEMBERS**

For the reasons stated in open Court at the Status Conference on March 8, 2004,  
Plaintiffs' Motion for a Protective Order Regarding Subpoenas to Putative Class Members  
[Docket No. 632] hereby is DENIED.

Dated: March \_\_, 2004

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The Honorable Patti B. Saris